render the sale valid under the statute must be open, notorious and unequivocal. * * * The statute being a local one, applying only to sales in Missouri, the court will follow the construction given to it by the highest court of the state." And in *Robinson* v. *Elliott*, 22 Wall. 513, where the question arose under a chattel mortgage in Indiana, and the statute of the state was relied on, the court took great pains to ascertain the construction of the statute in that state, and Mr. Justice DAVIS says, in the opinion, "Although we have been unable to find any case from Indiana of similar facts with the one at bar, yet the decision in the *New Albany Insurance Co.* v. *Wilcoxson*, 21 Ind. 355, would seem to imply, that when such a case did arise, it would be decided in accordance with the views we have presented," and the court in its judgment, was governed by the tendency of the state court.

N. D. M.

RECENT AMERICAN DECISIONS.

Supreme Court of Vermont.

STATE v. TATRO.

The application of the common law rule, that a criminal offence is neither excused nor mitigated by the voluntary intoxication of the person who commits it, in trials for murder, is not affected by No. 44, Acts of 1869, making degrees of murder.

Thus, where it appears on trial for murder that the murder was done by some kind of wilful, deliberate, and premeditated killing other than by means of poison or by lying in wait, the degree of the offence is not lessened by proof that at the time it was committed the respondent was intoxicated, any more than it would be if it had been perpetrated by means of poison or by lying in wait.

INDICTMENT for the murder of Alice Butler, on the evening of June 2d 1876. At about 7 o'clock in the evening of the day of the alleged murder, Charles Butler, the husband of the murdered woman, left his house to go to a neighboring village, leaving behind the respondent, who was then at work for him, as he had been at intervals for two or three years before that time. On entering his house on his return at about 9 o'clock, he found the dead body of his wife lying on the floor, with marks of blows from some heavy instrument on the head.

The evidence on the part of the respondent tended to show that at the time of the alleged murder, the respondent was laboring under delirium tremens, acute mania, or some form of delirium resulting from excessive use of alcoholic drink, whereby he was

rendered incapable of premeditating, or forming a design; and expert testimony was introduced as to the nature and effects of delirium tremens.

The respondent requested the court to charge that if at the time of the commission of the act in question, the respondent was so far under the influence of intoxicating liquor as to be in a condition bordering on delirium tremens, and was unable to premeditate or form a design, malice could not be implied from the use of the deadly weapon with which the act was committed; that if he was so intoxicated as to be possessed of a mania, and was unable to deliberate or form an intent, then the act would be excusable homicide, or manslaughter at the most; and that malice could not be implied from the use of a deadly weapon, unless it was used with deliberation and not in the heat of passion.

The court charged that under the act of 1869, all murder perpetrated by means of poison or by lying in wait, or by any other kind of wilful, deliberate, and premeditated killing, &c., should be deemed murder in the first degree, and charged appropriately as to what under that act constituted other degrees of murder. The court also charged that an insane person was not punishable for his criminal acts; that insanity consisted in the incapacity to distinguish between right and wrong as to the act charged, and that in the eye of the law a person in the paroxysms of delirium tremens was insane. The court then called attention to the expert testimony upon the subject of that disease. Upon the question of intoxication as an excuse, the court charged as follows:

"The voluntary intoxication of one who without provocation commits a homicide, although amounting to a frenzy, that is, although the intoxication amounts to a frenzy, does not excuse him from the same construction of his conduct, and the same legal inferences upon the question of premeditation and intent, as affecting the grade of his crime, which are applicable to a person entirely sober. * * * I don't want to be misunderstood about this, and shall therefore repeat what I consider to be the law upon this point, that is, that if a party gets so intoxicated that he is crazy drunk, that it amounts to a frenzy, so that he does not know what he is doing, and if in such a condition he should commit a crime, which, if committed by a sober man would be murder, it is equally murder in the man that is thus drunk."

Verdict, guilty of murder in the first degree.

G. A. Ballard, *Willard Farrington*, and *F. W. McGettrick*, for the respondent.—The charge upon the question of intoxication was to the effect that the jury had no right to consider or weigh it in determining the degree of the crime; that a man who became voluntarily intoxicated, so that he did not know what he was doing, was not allowed to have that fact affect the grade of his crime, although he could not know, deliberate, or meditate upon the act before committing it. That was erroneous. *State* v. *Johnson*, 40 Conn. 136; *People* v. *Doyell*, 48 Cal. 85; *Jones* v. *Commonwealth*, 75 Penna. St. 403; 1 Am. Crim. Law, s. 41; 3 Greenl. Ev., s. 148; 15 Am. Law Reg. 505. The court having charged that there was no express malice, the respondent could not be convicted of murder in the first degree. *State* v. *Johnson*, 40 Conn. 136; s. c. 41 Conn. 584.

H. R. Start, state's attorney, and *H. S. Royce*, for the state.—The charge upon the subject of the effect of the intoxication of the respondent was correct: *The People* v. *Rogers*, 18 N. Y. 9, 27, and cases there cited; 1 Am Crim. Law, ss. 38, 41; *Smith* v. *Wilcox*, 47 Vt. 537; 2 Greenl. Ev. 374.

The opinion of the court was delivered by

REDFIELD, J.—[After noticing some points as to the jurors and the evidence, not of general interest.] The more important question arises upon the charge of the court upon the effect of intoxication upon the grade of the offence. The court charged the jury that voluntary intoxication could neither excuse nor mitigate the offence. There is, perhaps, no principle or maxim of the common law of England more uniformly adhered to than that voluntary drunkenness does not excuse or palliate crime. Lord COKE, in his Institutes, declares that "whatever hurt or ill he doeth, his drunkenness doth aggravate it:" 3 Thomas's Coke Lit. 46. And in his reports, *Beverley's Case*, 4 Coke 123 b, 125 a, he says: "Although he that is drunk is for the time *non compos mentis*, yet his drunkenness does not extenuate his act, or offence, nor turn to his avail." And Sir MATTHEW HALE, eminent alike for his humanity and learning, says of drunkenness, which he calls *dementia affectata:* "This vice doth deprive men of the use of reason, and puts many men in a perfect but temporary frenzy; * * but by the laws of England, such a person shall have no privileges by his voluntary contracted mad-

ness, but shall have the same judgment as if he were in his right senses." And Lord BACON, in his "Maxims of the Law," (Rule 5), in that comprehensive language which clearly defines and gives the reasons for the rule of law, thus asserts the doctrine: "If a madman commit a felony, he shall not lose his life for it, because his infirmity came by act of God; but if a drunken man commit a felony, he shall not be excused, because the imperfection came by his own default." In *Burrow's Case*, Lewin 75, A. D. 1823, HOLROYD, J., thus defines the rule: "It is a maxim in the law that if a man gets himself intoxicated he is answerable to the consequences, and is not excusable on account of any crime he may commit when infuriated by liquor, provided he was previously in a fit state of reason to know right from wrong." And the cases of *Rex* v. *Gridley* and *Rex* v. *Menkin*, 7 C. & P. 297, show the uniformity of this rule in the courts of England. In the case of *The People* v. *Rogers*, 18 N. Y. 9, the Supreme Court had reversed the conviction of Rogers on the ground that the court had excluded the evidence of the respondent's drunkenness, as affecting the criminal *intent*. But the case was, by writ of error, carried to the Court of Appeals, and the whole law upon that subject was reviewed and canvassed with great learning and ability by Chief Justice DENIO and HARRIS, J. HARRIS, J., says: "The Supreme Court seem to have understood that in all cases where without it the law would impute to the act a criminal intent, drunkenness may be available to disprove such intent. I am not aware that such a doctrine has before been asserted. It is certainly not sound. The adjudications upon the subject, both in England and this country, are numerous, and characterized by a singular uniformity of language and doctrine. They all agree that where the act of killing is unequivocal and unprovoked, the fact that it was committed while the perpetrator was intoxicated cannot be allowed to affect the legal character of the crime." But it is insisted that under the statute which makes "*degrees*" of murder, drunkenness qualifies and mitigates the higher offence. The statute declares that "all murder which shall be perpetrated by means of poison, or by lying in wait, or any other kind of deliberate and premeditated killing, * * shall be deemed murder in the first degree." The same or similar statute has been enacted in most of the states. And many courts have allowed drunkenness to be shown in mitigation of the higher offence. In the case of *State* v. *Jackson*, 40 Conn. 136, the court

held that intoxication, as tending to show that the prisoner was incapable of *deliberation*, might be given in evidence. Chief Justice SEYMOUR dissented, and FOSTER, J., who tried the case below, did not sit, so that the four judges constituting the court were, in fact, equally divided. The same case came before that court again in 41 Conn. 584, and the opinion was delivered by the same judge. The court were hard pressed with the former opinion in the same case, and that it had taken a departure from the common law. But the court repelled the intimation, and declared that "we have enunciated no such doctrine," but "held on a trial for murder in first degree, which under our statute requires *actual express malice*, the jury might and should take into consideration the fact of intoxication, as tending to show that such malice did not exist." And, in the same opinion, the judge says: "Malice may be implied from the circumstances of the homicide. If a drunken man take the life of another, unaccompanied with circumstances of provocation or justification, the jury will be warranted in finding the existence of malice, though no express malice is proved. Intoxication, which is itself a crime against society, combines with the act of killing, and the evil intent to take life which necessarily accompanies it, and all together afford sufficient grounds for implying malice. Intoxication, therefore, so far from disproving malice, is itself a circumstance from which malice may be implied. We wish, therefore, to reiterate the doctrine emphatically, that drunkenness is no excuse for crime and we trust it will be a long time before the contrary doctrine, which will be so convenient to criminals and evil-disposed persons, will receive the sanction of this court." This reasoning seems to us both illogical and incongruous. To constitute murder of the first degree, the act must, indeed, be done with *malice aforethought*. And that malice must be *actual*, not *constructive*. At common law, if the accused shoot his neighbor's fowls, and by accident kill the owner, he is guilty of murder, yet he did not intend to *murder* but to *steal*. Such cases are excluded by the statute from the definition of murder in the first degree. But "where the act is committed deliberately, with a deadly weapon, and is likely to be attended with dangerous consequences, the malice requisite to murder will be presumed; for the law infers that the natural and probable effect of any act deliberately done was intended by its actor:" 2 Am. Crim. Law, s. 944. "And intent for an instant before the blow, is sufficient to constitute malice:" Id. 948. It will be ad-

mitted that if the respondent had killed his victim "by poison, or lying in wait," the act would have been murder in the first degree, and the fact that he was intoxicated could not have been admitted to excuse or palliate the crime. Yet it is claimed that if the circumstances show that the murder was deliberately planned, and executed with fiendish barbarity and malice, drunkenness may come in to palliate the crime.

This, we think, is making a distinction without a difference. Chief Justice HORNBLOWER, 1 Am. Crim. Law, s. 1103, speaking of the New Jersey statute, which is like ours, says: "This statute in my opinion, does not alter *the law of murder* in the least respect. What was murder before its passage is murder now—what is murder now was murder before that statute was passed. It has only changed the punishment of the murderer in certain cases: or rather, it prescribes that, in certain specified modes of committing murder, the punishment shall be death, and in *all other kinds of murder* the convict shall be punished by imprisonment."

The evidence, so far as detailed in this case, if believed, shows a murder most fiendish and shocking. He destroyed the last resisting vitality of this woman, struggling for her life, with an axe, which shows malice and malignity of purpose. The language of Chief Justice MCKEAN, while discussing a like statute in Pennsylvania, and in a case quite similar to this, is fitting and sensible. He says: "It has been objected that the amendment of our penal code renders *premeditation* an indisputable ingredient to constitute murder in the first degree. But still it must be allowed that the intention remains, as much as ever, the true criterion of crime, in law as well as in ethics; and the *intention* of the party can only be collected from his words and actions. * * But let it be supposed that a man without uttering a word should strike another on the head with an axe, it must on every principle by which we can judge of human actions, be deemed a *premeditated* violence:" *Respublica* v. *Mulatto Bob*, 4 Dall. 145. The statute has in no degree altered the common-law definition of murder. But the killing a human being by poison, or lying in wait, or by purposely using a deadly weapon to that end, is murder in the first degree; and the purpose and intent to kill must be determined by the circumstances of the case; for the murderer takes with him no witnesses, and does not often avow his purpose.

Where the requisite proof is adduced to show a wicked, inten-

tional murder, he is not permitted to show a voluntary and temporary intoxication in extenuation of his crime.

The respondent takes nothing by his exceptions.

Some confusion seems to exist as to the proper effect of intoxication in criminal prosecutions. On the one hand, it is often said to be an aggravation rather than an excuse for crimes. Blackstone's familiar language is, that as to "artificial, voluntarily contracted madness by drunkenness or intoxication, which, depriving men of their reason, puts them in a temporary phrensy; our law looks upon this as an aggravation of the offence, rather than as an excuse for any criminal misbehavior: 4 Bl. Com. p. 25. Lord COKE, also, used similar language: 4 Co. 125, *a*; 3 Thomas Coke 46.

But obviously this can not be true. Simple larceny is only simple larceny, however intoxicated the thief; a common assault and battery does not become an "aggravated assault," nor manslaughter increase to murder, by the fact that the perpetrator was under the influence of intoxicating liquors, though voluntarily taken. It is quite erroneous, therefore, to use such language to a jury as it is very likely to mislead, and may be sufficient to set aside a verdict. See *Ferrell* v. *The State*, 43 Tex. 507 (1875); *McIntyre* v. *The People*, 38 Ill. 514.

On the other hand, it is frequently declared that drunkenness is never an excuse for, or even an extenuation of a crime. In one sense, that is undoubtedly true. If the crime has been in fact committed, if a defendant has deliberately and with malice aforethought committed a homicide, it is no excuse or extenuation that he was at the moment of its commission, deeply intoxicated. He might have become so simply to nerve himself for the act, or his act might be wilful and malicious although he was intoxicated; and his condition would not even reduce the crime to manslaughter or to murder in the second degree: *Commonwealth* v. *Hawkins*, 3 Gray 466 (1855).

If he has intentionally committed an assault and battery, the fact that he was intoxicated cannot of itself excuse or extenuate his act. What would be murder in a sober man is not reduced to manslaughter merely because the perpetrator was then intoxicated, even though such condition was not produced for the purpose of committing the crime.

Some countenance was given to such a view in *Smith* v. *The Commonwealth*, 1 Duv. 220; and *Bleinn* v. *The Commonwealth*, 7 Bush 320, but the error was afterwards discovered and corrected by the same court in *Shannahan* v. *The Commonwealth*, 8 Bush 463 (1871).

And such is the well-established and only safe rule of law; *People* v. *Rogers*, 18 N. Y. 1; *State* v. *Turner*, Wright 30; *State* v. *John*, 8 Ired. 330: *Cornwall* v. *The State*, Mart. & Yerg. 147; *Pirtle* v. *The State*, 9 Humph. 663; *U. S.* v. *Clark*, 2 Cranch C. C. 158; *U. S.* v. *McGlue*, 1 Curtis C. C. 1; *Carter* v. *The State*, 12 Tex. 500.

But between these two extremes there is a broad middle ground, where the fact of drunkenness *may be* entitled to weight, not as an excuse for the crime, nor even as an extenuation, but as tending to show that in fact no crime, or not the *particular* crime charged, was ever committed.

Whenever the existence of some particular intent, motive or knowledge must be actually and expressly proved by the evidence, and is not necessarily inferred from the fact itself, then the question of ability to form such intent, cherish such motive, or possess such knowledge, is important; and if such inability was owing to intoxication, it should have the same effect as if due to any other excuse, no more, no less

Ferrell v. *The State*, 43 Tex. 508 (1875).

Thus, in a prosecution for passing counterfeit money, the knowledge of the character of the coin is an essential fact to establish by evidence. The defendant may therefore always show he was so intoxicated at the time he could not discriminate between genuine and spurious money; this evidence might not be *conclusive*, for it might be shown in reply that he had made or procured the money for an unlawful purpose when sober, but unless controlled by some other evidence, the fact of such intoxication, if fully established, might be a complete defence: *Pigman* v. *The State*, 14 Ohio 555 (1846), where the reasons for such a rule are well stated by READ, J.; *United States* v. *Roudenbush*, 1 Bald. 518 (1832).

In an indictment for larceny it might be shown in evidence that the defendant was too intoxicated to distinguish the property taken from his own of a similar appearance, or that he was too confused and bewildered to form an intention of stealing, or to know he was doing so; but this might not be conclusive, as he might have formed the design before, when sober: see *Wenz* v. *The State*, 1 Tex. Ap. 36 (1876): *Bailey* v. *The State*, 26 Ind. 422 (1866; *State* v. *Schingen*, 20 Wisc. 74 (1865); *People* v. *Walker*, 17 Am. Law Reg. N. S. 473 (1878).

So where a person is indicted for perjury, in having falsely described a former transaction *in pais*, he may show in defence that he was so grossly intoxicated at the time and place where the transaction occurred that he could not then correctly understand what was done, and so in mis-stating it in court he did not do so knowingly and corruptly: *Lytle* v. *The State*, 17 Am. Law Reg. N. S. 535.

So a person indicted for "knowingly" voting twice at the same election—under a statute—may prove he was so intoxicated the second time as to be unable to know he had voted before; and if so he could not be convicted: *The People* v. *Harris*, 29 Cal. 678 (1866). It might be different if the statute made it penal to vote, without regard to the actual knowledge or intention of the the voter, as seems to have been held in *State* v. *Welsh*, 21 Minn. 22 (1874).

On a charge of an assault "with intent to kill," in order to convict of the *whole offence*, the specific intent must be proved to exist; it is not necessarily inferred from *the mere fact* of the assault, although the mode and manner of the assault may be sufficient to prove it; if, therefore, the accused was really too drunk to be capable of forming any intention whatever, and none such had ever existed before, it would be a defence to that part of the charge, though not to the minor offence of a common assault: *Regina* v. *Cruse*, 8 C. & P. 541; *Regina* v. *Monkhouse*, 4 Cox C. C. 55; *People* v. *Hammill*, 2 Parker C. C. 223, 235; *Mooney* v. *The State*, 33 Ala. 419; *State* v. *Garrey*, 11 Minn. 154; *Nichols* v. *The State*, 8 Ohio St. 435.

So if a statute defining murder in the first degree, requires it to be done "deliberately and premeditately," evidence that the defendant was too much intoxicated to deliberate and to premeditate is certainly competent, and if the jury find the fact to be so, and there was no evidence of prior premeditation, a jury certainly would be warranted, if not required, in finding not guilty of that degree of murder. But the intoxication is not an excuse or extenuation as a matter of *law*, but only a circumstance to be considered by the jury: *Jones* v. *The Commonwealth*, 75 Penn. St. 403 (1874); *Pirtle* v. *The State*, 9 Humph. 663, a valuable case on this point; *State* v. *Johnson*, 40 Conn. 136 (1873); 41 Id. 577; *People* v. *Williams*, 43 Cal. 345 (1872); 21 Id. 544, 27 Id. 507 But see contra, *The State* v. *Cross*, 27 Mo. 332.

So in such cases evidence of intoxica-

tion is *competent* upon the question whether the killing sprang from premeditation or from sudden passion excited by inadequate provocation; that is, whether the intention to kill preceded the provocation or was produced by it: *Haile* v. *The State*, 11 Humph. 154; *Swan* v. *The State*, 4 Id. 136; *Jones* v. *The State*, 29 Geo. 594; *Rex* v. *Thomas*, 7 C. & P. 820.

But inadequate provocation for a sober man, insufficient to mitigate his act, will not, *in and of itself*, have such effect in case of an intoxicated person. There are not two rules of sufficient provocation, one for sober men, and one for drunken men: *Keenan* v. *The Commonwealth*, 44 Penn. St. 55, an excellent case on this point. And see *State* v. *McCanto*, 1 Speers 384.

But the effect and weight of the fact of intoxication, as tending to show the absence or want of some specific intent or of premeditation, is solely for the jury. It is a matter to be considered by them. The court, as a matter of law, do not draw any conclusions from it either way. The fact of intoxication at the moment, is of course not conclusive of a want of intent or premeditation. The intent may have been formed before, or it may exist, notwithstanding the intoxication, and concurrently with it. The defendant is not entitled to a charge or instruction that intoxication *will* show a want of intent: *The State* v. *White*, 14 Kans. 538 (1875); *Smith* v. *The State*, 4 Nev. 278 (1876); *State* v. *Avery*, 44 N. H. 398 (1862); *Kenny* v. *The People*, 39 N. Y. 330; *O'Brien* v. *The People*, 48 Barb. 280.

But where the crime is made out from implied malice, such as an unprovoked assault and battery or murder, a malicious stabbing, or maliciously poisoning a horse, the malicious intent being sufficiently proved by the act itself, the fact of drunkenness has very little, if any weight, as a defence: see *Nichols* v. *The State*, 8 Ohio St. 435 (1858), a case of malicious stabbing; *The People* v. *Porter*, 2 Parker C. C. 14, a case of blasphemy; *O'Hernin* v. *The State*, 14 Ind. 420; *Dawson* v. *The State*, 16 Id. 428; *State* v. *Harlow*, 21 Mo. 446, a case of manslaughter; *Choise* v. *The State*, 31 Geo. 424; *State* v. *Mullen*, 14 La. Ann. 570; *The State* v. *Gut*, 13 Minn. 343; *Golden* v. *The State*, 25 Geo. 527; *State* v. *Johnson*, 41 Conn. 577.

And that view seems to have led to the decision in *State* v. *Tatro*, since the learned judge speaks of the evidence of the mode and manner of the crime as showing "malice and malignity of purpose," although it is possible the last sentence in the reported instruction to the jury may not be entirely consistent with some of the decisions stated above.

EDMUND H. BENNETT.

Court of Errors and Appeals of New Jersey.

HURFF v. HIRES.

Where there is a sale of a specified quantity of goods from a mass, identical in kind and uniform in value, a separation of the quantity sold is not necessary to pass the title, where the intention of the parties that the property should pass by the contract of sale is clearly *manifested;* otherwise, where the articles composing the mass are of different qualities and values, making a selection, and not merely separation, necessary.

The defendant bought of one H. two hundred bushels of corn out of a lot of four or five hundred bushels in H.'s crib-house. He inspected and approved of the corn